BOOK REVIEWS

SCIENCE OF LEGAL METHOD. Select Essays by Various Authors. Translation by Ernest Bruncken, Washington, D. C. and Layton B. Register of the University of Pennsylvania Law School. With Introductions by Henry N. Sheldon, Former justice of the Supreme Judicial Court of Massachusetts and by John W. Salmond, Solicitor General of New Zealand. Boston: The Boston Book Company, 1917; pp. lxxxvi, 593.

Although the several volumes of the Legal Philosophy Series have been received with the grateful approval of many lawyers and others who were seeking for a solution of the difficult problems arising on the border land between metaphysics and law, this approval has been by no means unanimous, the criticisms coming from the metaphysicians, the jurists and the lawyers. The first say this is not philosophy (Cf. 13 MICH. L. REV. 715); the second say it is bad law (Cf. 27 HARV. L. REV. 718); the last say it is all nonsense (Cf. 16 MICH. L. REV. 287-375, *passim*). The preceding volumes of the Series have been frankly philosophical. The present volume, however, as its title indicates, if philosophical at all, is pragmatic rather than metaphysical. We are here dealing not with what jurisprudence *is* but with what you can *do* with it, or for it; we are not attempting to investigate the nature of justice, but are trying to see how we may best attain it.

This volume contains essays from the French scholars, Gény and Lambert; the Chilean Alvarez; the Germans: Ehrlich, Gmelin, Berolzheimer, Kohler, Gerland and Wurzel; the Professor of Law at the Law School of Nagyvarad (Grosswardein) Hungary, Dr. Geza Kiss; and our own jurists, Dean Pound and Professor Freund. The editorial preface contains an illuminating discussion of the Judicial Function by Dean Wigmore, and of the Legislative Function, by Professor Kocowrek. There is also a short introduction by Judge Sheldon of the Supreme Court of Massachusetts and another by Solicitor General John W. Salmond of New Zealand. This constitutes certainly a cosmopolitan and imposing array, and it is interesting to note that despite the varying nationalities of the writers and the different characteristics of the legal system under which they are working, the problem of interpretation is the same and its solution under one system is essentially identical with that under every other system. All deal with the practical question as to how statutory law or its equivalent the doctrine of the decided case may be extended by proper methods of judicial thinking to meet new situations and establish new rights.

Gény says in regard to this (p. 45): "the courts are led, without exceeding the well-known limits of private law, whenever they have no formal guidance furnished by statute or established custom, to search for light among the social elements of every kind that are the living force behind the facts they deal with, if they wish to proceed with any assurance of being right." Wurzel, by a psychological devise that he calls "projection," would 'extend

the concept found in formulated law to phenomena which were not originally contained in the concept, without, however, changing the nature of the concept as such'; while Kohler would interpret a rule of law sociologically, that is, 'as a product of the whole people whose organ the law-maker has become.' The French professor, the Austrian jurist and the German legal philosopher are thus in agreement on the doctrine of the interpretation of a rule of law by a proper exercise of free judicial decision. Dean Pound calls attention to the fact (p. 225) that our own Supreme Court has already taken a long step in the same direction. Justice HOLMES' statement in *Lochner* v. *New York*, 198 U. S. 45, that, "The decision will depend on a judgment or intuition more subtle than any articulate major premise," though given in a dissenting opinion seems to have received the endorsement of the Court in *Muller* v. *Oregon*, 208 U. S. 412, in which Mr. Justice BREWER said, "We take judicial cognizance of matters of general knowledge."

If this last decision is good law, it would seem that not only the various continental countries but also our own highest tribunal have by different routes arrived at the same destination and this too, not by any conscious imitation of the one by the other but because of the irresistible logic of the situations in which the courts have found themselves.

The Science of Law and possibly the entire Legal Philosophy Series would thus seem to be justified; philosophically, because jurists in different parts of the world and under diverse systems of law have been inevitably carried to the same goal in their search for a broader and more perfect justice; legally, because the results arrived at are not out of harmony with the several systems of law under which they have been reached. JOSEPH H. DRAKE.

WAIVER DISTRIBUTED AMONG THE DEPARTMENTS ELECTION, ESTOPPEL, CONTRACT, RELEASE. By John S. Ewart, K. C., LL. D. Foreword by Roscoe Pound, Ph. D., LL. D. Cambridge, Harvard University Press, 1917; pp. XX, 304.

Until the appearance of the illuminating discussions of Dr. Ewart in this and allied fields began to appear, that word the meaning of which was least well understood, the word most often used in judicial fog and legal delirium, was "waiver." In the whole territory of the law there was no other so popular a "city of refuge" for a soul lost in the legal wilderness as that one over whose wide open gates was written "waiver."

It seems not too much to say of this book, "Waiver Distributed," that it is entitled to take its place among the modern legal classics, of which, in this age of digests and compilations, it is a satisfaction to believe we have a few. It is a study, not so much upon authority in the sense that the author is attempting to discover in judicial utterance or other authoritative discussion the principles involved, as it is an attempt to show that jurists and other legal writers have failed to discover the legal concepts hidden in the term "waiver," and in this his attempt amounts to a demonstration.